

The Public Prosecutor's second ground of appeal was that the learned president had erred in law in holding that samples taken did not comply with the requirements of section 116 of the Customs Ordinance. The learned president in agreeing with learned defence counsel's submission had in fact held that at least 3.6 bales of tobacco should have been sent to the chemist for testing and not samples of contents from 10% of each of the 16 bales and 20 bales.

In my view, to raise the presumption under section 116 of the Customs Ordinance, it would be sufficient to open, examine, and if necessary to test the contents of only 10% of the packages or receptacles of each description. It would not be necessary to test the contents of every package or receptacle. 10% refers to the packages or receptacles and not to the quantity or weight the goods contained therein. One of the methods for testing the contents is to take samples of the contents for examination. This section does not require the taking of any particular quantity or weight for testing provided samples are taken from the contents of 10% of each description or type of packages or receptacles.

I am fortified in this view by the case of *Au Ah Lin v. Public Prosecutor*⁽¹⁾ which dealt with the interpretation of section 61 of the Excise Act, 1961. This section is similar to section 116 of the Customs Ordinance. Lord President Thomson in delivering the judgment of the Federal Court says that section 61 of the Excise Act does not require that samples be taken of the contents of every package or container in question, nor does it require the taking of any particular quantity, and that the words "ten per centum" refer to the packages and not to the contents of each package. The learned president was clearly wrong in holding that 3.6 bales of tobacco should have been sent to the chemist and not merely samples of the same.

The Public Prosecutor's appeal is therefore allowed.

There is another unsatisfactory feature in this trial in the lower court. Although the offences mentioned in the two cases (No. 30/64 and No. 31/64) occurred at or about the same time and place, yet in each case the vehicle with which the offence was committed was different, the bales of tobacco were different, the accused persons involved were different, and the customs officers who stopped the vehicle in each case were different. Each case is complete by itself. What may be tobacco in one vehicle may not be tobacco in the other. When these two cases are jointly tried together, the evidence in one case may unfairly prejudice the accused in the other. In the interest of all, these two cases should be tried separately.

I set aside the order of acquittals in both

cases. These two cases are sent back for retrial *de novo* before other presidents of the sessions court. These two cases are to be tried separately by two different presidents.

Order accordingly.

CHINESE BANKERS TRUST CO. LTD. v. LOW CHENG KIAT & ANOR.

[O.C.J. (Ismail Khan J.) January 17, 1966]

[Malacca — Civil Suit No. 46 of 1959]

Land Laws — Landed property — Claim for possession — Defence of limitation — Licence — Adverse possession — Limitation Ordinance, 1953, s. 9.

Limitation — Licensee in permissive occupation — Claim of adverse possession.

The trustees of an estate claimed possession of a house which had been used as the family house. The defence raised was that of limitation, it being alleged that there had been adverse possession by one Wi Chi Neo for the full statutory period of twelve years. The facts showed that Wi Chi Neo had gone to live in the house as the bride of one of the deceased's son. No rent had been demanded from her.

Held: (1) in this case Wi Chi Neo was only a licensee of the premises and the failure to demand rent from her could not convert the permissive occupation into an adverse one so as to attack the operation of the Limitation Ordinance;

(2) the possession in this case was not adverse and therefore the plea of limitation fails and the plaintiffs were entitled to possession of the premises.

Cases referred to:—

- (1) *Dawkins v. Baron Penrhyn* (1878), 4 App.Cas. 51.
- (2) *Hubbuck v. Wilkinson* [1897] 1 Q.B. 90, 91.
- (3) *Buck v. Howarth* [1947] 1 All E.R. 342.
- (4) *Booker v. Palmer* [1942] 2 All E.R. 674.
- (5) *Cobb & Anor. v. Lane* [1952] 1 All E.R. 1199.
- (6) *Ejas Ali Qidwai v. Special Manager, Court of Wards Balrampur Estate & Ors.* A.I.R. 1935 P.C. 53 at p. 56.
- (7) *Corea v. Appuhamy* [1912] A.C. 231 at p. 236.

CIVIL SUIT.

R. H. V. Rintoul for the plaintiffs.

F. K. Sellar for the dependants.

Cur. Adv. Vult.

Ismail Khan J.: The plaintiffs are the Chinese Bankers Trust Company Limited trustees of the will of one Low Guan Swi, deceased. They claim possession of all that part and parcel of ground with a brick house and outhouses erected thereon known as No. 55, (formerly No. 32) Heeren Street, Malacca, described in an indenture dated 9th May, 1898, Registered No. 195 of 1889, hereinafter called the "said premises". There is also a claim for mesne profits at the rate of \$200 per mensem.

Until her death in 1960, one Wi Chi Neo was

in occupation of the said premises together with other persons. Originally the suit was against Wi Chi Neo on her behalf and on behalf of others residing at the said premises. Wi Chi Neo in her defence pleaded limitation. She died before the hearing of the suit. The 1st defendant, one Low Cheng Kiat, was appointed to represent her estate. The 2nd defendant, the said Low Cheng Kiat, was also appointed to represent the other people residing at the said premises.

The 2nd defendant did not file any defence.

Mr. Sellar for the defendants at the outset applied under Order 25 Rule 4 of our Supreme Court Rules to strike out the statement of claim. He said the deceased died on 18th June, 1898, possessed among others of the said premises. Under section 10(2) of the Limitation Ordinance, No. 4 of 1953, the right of action accrued as from that date and the period of twelve years had elapsed. He cited the case of *Dawkins v. Baron Penrhyn*.⁽¹⁾ That case has no application. There the defendant put in a demurrer alleging the statement of claim was bad in law. Now Order 25 Rule 1 abolished all demurrers. One method of getting rid of pleadings now and the one the defendant adopted is under Order 25 Rule 4. This is appropriate in plain and obvious cases, so that it could be said that the statement of claim as it stands even if proved is insufficient to entitle the plaintiff to his relief. (*Hubbuck v. Wilkinson* ⁽²⁾).

In the present case, the plaintiffs ask for possession and allege that the defendants were wrongfully in possession. The defendants sought to strike the statement of claim because of the defence of limitation. The question whether limitation arises or not is a matter of evidence. I therefore refused the application.

The events leading up to these proceedings and which are not in dispute are briefly as follows. The said Low Guan Swi, deceased, (hereinafter referred to as the deceased) died in June 1898. Probate of his will was granted to his widow one Chan Tew Neo in December 1898. In October 1929 the Estate and Trust Agencies Limited were appointed trustees of the said will in place of Chan Tew Neo. In October 1939 the plaintiffs were appointed the new trustees of the will. The deceased by clause 11 of his will gave and devised the land and house known as No. 55, (formerly No. 32) Heeren Street, Malacca, amongst other properties (therein referred to as "the Reserved Trust Estate") unto his trustee upon trust until the expiration of 21 years after the death of the last survivor of his four sons Low Kay Whay, Low Kay Seng, Low Kim Hok and Low Kim Watt and his grandsons Low Yong Chuan and Low Sek Kay to pay the costs of repairs, quit rents, assessments and other rates and outgoings out of the rents, issues and profits and to pay all expenses for periodical

A offerings for *Sin Chew* of the deceased's parents and himself and to stand possessed of the residue of such rents and profits upon trust for his said wife for her life.

The deceased further directed that after the death of his said wife the balance of the income of the said Reserved Trust Estate should be divided into four equal shares and dealt with in the following manner:—

(a) One share to be paid to his said son Low Kay Whay during his life and after his death to his widow for the maintenance and support of herself and any child or children of the said Low Kay Whay living at the time of his death and should the said Low Kay Whay die without issue such share to be paid to his widow during her life and after her death to lapse and form part of the said Reserved Trust Estate.

(b) One share to each of the deceased's said sons Low Kay Seng, Low Kim Hok and Low Kim Watt with similar limitations and gifts over as those relating to the gift to the said Low Kay Whay.

The widow of the deceased the said Chan Tew Neo died on the 25th day of May, 1934.

The said Low Kay Whay died on the 7th day of December, 1904, leaving him surviving two widows Chua Geok Koon and Maria Low and three sons, one Low Cheng Chuan (who died on 10th November, 1915) by the said Chua Geok Koon and the other two Low Cheng Siew and Low Cheng Lim by the said Maria Low. The said Chua Geok Koon died on the 12th day of May, 1922 and the said Maria Low died on the 7th day of February, 1958.

The said Low Kay Seng died on the 12th day of January, 1929 leaving him surviving an only son Low Chin Chye.

The said Low Kim Hok died on the 17th day of September, 1903 leaving him surviving a widow Aw Yeo Neo and an only son Low Seck Kay who died on 17th October, 1915. The said Aw Yeo Neo died on the 9th day of October, 1958.

The said Low Kim Watt died on the 24th day of October, 1940 leaving him surviving a widow Wi Chi Neo and three sons Low Cheng Wi, Low Cheng Liang and Low Cheng Kiat.

Although no provision is made in the deceased's will for the use of the said premises as a family house, it has been occupied by members of the deceased's family since his death. All his sons and their widows have at some time or other lived there. The *Sin Chew* ceremonies were carried out at the said premises and expenses therefor were met out of the rents and profits of the Reserved Trust Estate.

In 1929 when the Estate and Trust Agencies became trustees of the deceased's will there were at least the following members of the family residing in the said premises — the deceased's widow Chan Tew Neo, Wi Chi Neo and her family and Aw Yeo Neo and her family. In

that year, as a result of a quarrel with the deceased's widow Aw Yeo Neo left and did not return until after the former's death. Both Wi Chi Neo and Aw Yeo Neo continued to reside in the said premises and were so residing when the plaintiffs took over the trusteeship in 1939. As P.W.1, the secretary of the plaintiff company said, they were allowed to remain as they were members of the deceased's family. This arrangement continued until 1958 when a son of the said Low Kay Whay one Low Cheng Siew wrote through his solicitors (P.10) to the plaintiffs and raised objections to the maintenance of the premises as a family house and to the occupation thereof by Wi Chi Neo and Aw Yeo Neo free of rent.

On 11th September, 1958, the plaintiffs' solicitors wrote P.7 to both Wi Chi Neo and Aw Yeo Neo to inform them of the situation which had arisen as a result of the letter (P.10). On 3rd October, 1958, the plaintiffs received a reply from Wi Chi Neo and Aw Yeo Neo claiming adverse possession of the said premises. In October 1958 Aw Yeo Neo died. On 9th September, 1959, the plaintiffs commenced this action.

It is common ground between the plaintiffs and the defendants that no rent was paid by any member of the deceased's family. According to P.W.1, when the plaintiffs took over the records of the estate from the Estate and Trust Agencies there was nothing therein to show the conditions under which the members of the deceased's family were occupying the premises. It was submitted for the 1st defendant that Wi Chi Neo was not an agent or servant of the Estate and Trust Agencies or the plaintiff company. She had no interest in the deceased's property apart from income from the trust for the maintenance of herself and her children. No provision is made in the will for the use of the premises as a family house. The trustees were directed to carry out repairs and pay rates and outgoings out of the profits from the Reserved Trust Estate of which the said premises formed a part. In 1929 when the deceased's widow ceased to be the trustees, the Estate and Trust Agencies should have regularised the position as to the rights of the persons in occupation of the premises. This they failed to do.

It was contended by Mr. Sellar for the 1st defendant that in the circumstances Wi Chi Neo had an uncertain interest in the premises and was therefore a tenant at will as from October 1929. He referred to the case of *Buck v. Howarth*.⁽³⁾ In that case the respondent and his wife occupied a freehold dwelling-house, the property of the wife. By her will, the wife devised the house to her son, who told the respondent that he could live in the house until he died. The respondent paid no rent to the son, and the son paid the rates. By deed of gift dated

A December 21, 1945, the son gave the property to the appellant, who likewise received no rent from the respondent and also paid the rates. It was held that the respondent was given an uncertain interest in the premises and the law would presume a tenancy at will.

B It was further contended for the 1st defendant that as under section 13 of the Limitation Ordinance the tenancy is deemed to have determined in October 1930, and as Wi Chi Neo had been in possession for the full statutory period of twelve years under section 9 of the Ordinance, the property is hers absolutely and the plaintiffs' claim is barred. It seems to me that the question whether Wi Chi Neo was a tenant at will or not is one of the intention of the parties. The principle applicable in such cases is set out in *Booker v. Palmer*.⁽⁴⁾ There Lord Greene M.R. said at page 676:—

D "Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention. Where the parties enter into a formal document the intention to enter into formal legal relationship is obvious; but when all that happens is a quite casual conversation on the telephone, it is very much more difficult to infer that the parties are really contemplating entering into any legal relationship at all and in particular, such a special relationship as that of landlord and tenant. . . . There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

F This principle was followed in the case of *Cobb and Anor. v. Lane*.⁽⁵⁾

G In the present case Wi Chi Neo went to live in the premises as a bride of one of the deceased's sons. She continued to live there after the death of the deceased with the deceased's widow and other members of the deceased's family as such member of the family. It was a family arrangement. In P.6 she admitted that the premises were ancestral property. In 1929, as P.W.1 said in his evidence, Wi Chi Neo and the other members were allowed to remain as they belonged to the deceased's family. The trustees merely permitted this family arrangement to continue. The occupation by members of the deceased's family is to be ascribed to the tolerance of the trustees and is therefore in my view permissive in character. I therefore find as a fact that Wi Chi Neo was a mere licensee in 1929. No doubt the trustees had failed to demand any rent and had therefore been in breach of their duties, but such a breach cannot convert what was a permissive occupation into an adverse one so as to attract the operation of the Limitation Ordinance.

H Possession, to be adverse "must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the

Limitation Ordinance. When any of these elements is lacking no title by adverse possession can ripen." (See *Rustomji* on Law of Limitation, 5th edition, page 1369).

In *Ejas Ali Qidwai and others v. Special Manager, Court of Wards, Balrampur Estate and others*,⁽⁶⁾ Sir Shadi Lal said at page 56:—

"The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

And in the case of *Corea v. Appuhamy*⁽⁷⁾ at page 236, Lord McNaughton said that where the possession of the defendant is in its inception merely permissive, it is not possible for him to put an end to that possession by any secret intention in his mind. There must be an ouster. Was there then in 1929 an act on the part of Wi Chi Neo amounting to such an ouster? The answer to that is given by her own son, the 1st defendant. He said in cross-examination:—

"My mother was not in exclusive possession of 55, Heeren Street. There were always other members of the family living there. Wi Chi Neo and Aw Yeo Neo regarded the house as an ancestral house. When my father died my mother was allowed to stay as she was the daughter-in-law of my grandfather. No letter to the trustees that she was occupying in a capacity other than that in which she first occupied the house. Nothing to show she was occupying the house other than as beneficiary."

The only indication that she was holding the premises other than as a licensee was in 1958, when she sent a reply (P.8) through her solicitor to the plaintiffs' letter (P.7), claiming adverse possession.

The defence of limitation therefore fails.

Finally, it was objected that the plaintiffs had failed to prove their title to the property. On this point it is to be observed that it is specifically pleaded in the statement of claim that the plaintiffs are the trustees of the will of the deceased who was seized in fee of the premises and are entitled to the possession thereof. This was never put in issue. Alternatively, in view of paragraph 2 of the defence, the 1st defendant cannot be heard to say that the plaintiffs had no title when she is alleging adverse possession against them. This objection fails.

There must be judgment for the plaintiffs for possession of the lands, hereditaments and messuages, that is to say, all that certain part or parcel of ground with the brick house and outhouses thereon erected No. 55, Heeren Street, Malacca, comprised and described in a Deed of Indenture, 11th day of May, 1889, Registered No. 195 of 1889, mesne profits at \$200 per mensem from today until the date of possession and costs of this action.

Judgment for the plaintiffs.

A Solicitors: *Shearn, Delamour & Co.; Sault, Keith Sellar & Co.*

AYAVOO v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Thye F.J.) January 17, 1966]

B [K.L. — Criminal Appeal No. 69 of 1965]

Criminal Law and Procedure — Police supervisee — Breach of condition to remain indoors — Mens rea — Prevention of Crime Ordinance, 1959, s. 15(2) and (4).

C The appellant had been convicted of failing to comply with a condition to remain indoors between the hours of 8 p.m. and 6 a.m. an offence under section 15(4) of the Prevention of Crime Ordinance, 1959. The facts were that on his way home on a bicycle he wobbled while crossing a wooden bridge and fell off the bicycle. He was found at 11.30 p.m. bleeding by the roadside, with one leg trapped under his bicycle and taken to hospital where he came to.

D Held: as in this case the appellant was out of doors merely through the misfortune of having an accident, the conviction cannot be upheld and must be quashed.

CRIMINAL APPEAL.

Appellant in person.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

E Ong Hock Thye F.J.: The appellant was tried and convicted in the sessions court at Kuala Kubu Bharu on the following charge:

F "That you on 25.4.65 at about 11.30 p.m. in front of C.E.B. Office, Jalan Hamzah, Kuala Kubu Bharu, in the district of Ulu Selangor, in the State of Selangor, being a registered person as defined by section 2 of the Prevention of Crime Ordinance No. 13 of 1959, and being subject to the supervision of the police for a term of five years, w.e.f. 29.8.60, and whilst under such supervision shall remain within doors between 8.00 p.m. and 6.00 a.m. unless you obtain special permission to the contrary from the Officer-in-Charge Police District, Kuala Kubu Bharu, did fail to comply with such restriction and that you have thereby committed an offence under section 15(2)(f) and punishable under section 15(4) of the Prevention of Crime Ordinance No. 13 of 1959."

G The learned president sentenced him to the maximum term of five years imprisonment because he had previously committed two breaches of the restricted residence conditions imposed by the order of police supervision in 1961 and 1963. This appeal is against sentence only.

H The simple facts of the case as presented by the prosecution and defence respectively were not challenged by the other side. The appellant had had his evening dinner at the mother's house and then left for his place of abode in good time to beat the dead-line of 8 p.m., when he had to be indoors. Having drunk a half-bottle of samsu, though still able to ride a bicycle, he proceeded safely along until at about 7.40 p.m. he wobbled while crossing a wooden bridge and fell off near the C.E.B. Station. At 11.30 p.m. he was found bleeding by the roadside, with one leg still trapped under his bicycle, by a mobile police